HWN:lnc
584:45:OLC
OP 57-36

April 23, 1957

Mr. Earl W. Fase
Tax Commissioner
Territorial Tax Office
Honolulu, Hawaii

Attention: J. Bell

Dear Sir:

This is in reply to your request for the opinion of this office as to the applicability of the Territorial Inheritance Tax to certain real property conveyed by Mary C. Silva, decedent, to her daughter and son-in-law about five years before her death.

The pertinent parts of section 5552, Revised Laws of Hawaii 1945, as amended, provide as follows:

> "All property which shall pass ... from any person who may die seized or possessed of the same ... or which or any interest in or income from which, shall be transferred by deed, grant, sale or gift, made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death ... is subject to a tax ..."

The deed by which certain real property was conveyed by decedent on November 15, 1950 contains the following pertinent matter:

> "The grantor, for and in consideration of the sum of One Dollar ($1.00, ... and in further consideration of the love and affection which she bears toward the grantees, and also in consideration of the covenants on the part of the grantees hereinafter contained, does hereby grant and convey unto the grantees, as tenants by the entirety, the following described property: ..."
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> ...
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> "AND the reversions, remainders, rents, issues and profits thereof, and all of the estate, right, title and interest of the grantor, both at law and in equity, therein

and thereto; ..."

In consideration for such transfer, the grantees covenant to (1) permit the grantor to live on said premises free of charge or upon any premises held in the name of the grantees, (2) pay any mortgage on the premises made by the grantees so as not to permit a foreclosure on these or any other premises, (3) not permit the premises or any substituted premises to be taken on execution, (4) furnish maintenance and support to the grantor provided the grantor lives in the household of the grantees.

It is then further provided and mutually agreed that the obligations of the grantees shall be a charge upon the premises conveyed so long as the grantor shall be living, and that the grantees may mortgage the property conveyed within one year of conveyance in the amount of $4,000, which mortgage shall be superior to the encumbrance of the grantor.

The property did not pass by will or the intestate laws of the Territory and no information or evidence is known that would lead this office to believe the conveyance was made in contemplation of death. Any liability for the tax, therefore, would depend on whether the transfer of the property was intended to take effect in possession or enjoyment after the grantor's death.

The original statute, Act 102, Session Laws of 1905, was construed in the case of Brown v. Treasurer, 20 Haw. 41, wherein C. J. Hartwell, speaklng for the court, said on page 45, in regard to taxing an intervivos trust after the settlor died, "The act treats transfers of property, when so made that the beneficial rights to be derived from it remain with the transferer during his lifetime, and that the transferee or others for whom he holds the property do not have the use or disposal of it until after the death of the transferrer, as the same in legal affect as they are identical in substance with testamentary acts."

In opinions Nos. 1365 (1925-1926), 1406 (1927-1928) and 1858 (1946) this office held that a transfer during the decedent's lifetime, wherein he retained the income from the property transferee, but did not retain a power or revocation, was taxable upon his death as a transfer intended to take effect in possession and enjoyment at or after death. In a letter opinion to Earl W. Fase, dated April 9, 1956, this office held that a conveyance during the lifetime of the decedent wherein a life estate was left to "Act" for the life of the decedent and upon the death of the decedent the remainder passed to "B" was a transfer intended to take effect in possession and enjoyment at or after death and was therefore taxable.

Realizing that these opinions are related to the problem under discussion we do not feel that they are controlling, for the reason that our interpretation of the instrument of conveyance in the instant case leads us to conclude that there was a complete transfer of the property during the lifetime of the decedent, for a valuable and adequate consideration.

That portion of the conveyance first above quoted, in clear and unequivocal language conveys, for adequate consideration, a fee simple title absolute to the grantees. There is no withholding of any possession or enjoyment. Subsequently in the instrument, however, limitations on conveyance and pledging by way of security are placed upon the absolute conveyance. It is our opinion that these limitations do not affect the immediate transfer of "possession and enjoyment" but are merely ways of encumbering the property by the grantor in order to assure fulfillment of the grantees convenants (consideration). We analogize the arrangement to a conveyance with a purchase money mortgage back, wherein the purchase price is completely paid upon the death of the grantor or of the grantees.

In the case of In re Hess Estate, 96 N.Y.S. 990, it was held that under a contract whereby the first party agreed to reside on and work a farm as long as the second party and his wife, or either of them, should live, and to care for them, to harvest and thresh the wheat growing on the farm using whatever remained beyond the needs of the farm for his own benefit, to market the salable wheat they cut on the premises for the benefit of the second party, and to sell any surplus of grain; and, conveyed, subject to agreements, the farm, with the stock and personal property thereon, reserving the right to support, maintenance, and residence on the farm, and the first party agreed not to sell the premises during the lifetime of the second party or his wife, the transfer did not fall within the Taxable Transfer Act as a transfer intended to take effect in possession or enjoyment at or after death of the grantor. See also Estate of Lamb v. Morrow, 117 N.W. 1118, l40 Iowa 89.

We, therefore, are of the opinion that the inheritance tax does not apply to the subject realty and are returning herewith your file.

Vary truly yours,

HAROLD W. NICKELSEN
Deputy Attorney General

APROVED:

RICHARD K. SHARPLESS
Attorney General